United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7053-7084

To be argued by
HENRY J. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM GARAFOLA,

Plaintiff-Appellee,

—against—

F. A. DETJEN, "SAAR",

Defendant & Third Party Plaintiff-Appellee-Cross-Appellant,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant-Appellant.

B
P/S

BRIEF FOR DEFENDANT & THIRD PARTY PLAINTIFF-APPELLEE-CROSS-APPELLANT F. A. DETJEN (SAAR)

KIRLIN, CAMPBELL & KEATING
Attorneys for Defendant & Third Party Plaintiff-Appellee-Cross-Appellant
120 Broadway
New York, New York 10005

HENRY J. O'BRIEN
CHARLES N. FIDDLER
Of Counsel

INDEX

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No.'s 75-7053
75-7084

WILLIAM GARAFOLA,

Plaintiff-Appellee,

-against-

F. A. DETJEN, "SAAR",

Defendant & Third Party
Plaintiff-Appellee-Cross-Appellant,

-against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT & THIRD PARTY PLAINTIFF-APPELLEE-CROSS-APPELLANT F. A. DETJEN, (SAAR)

STATEMENT

The plaintiff-appellee, a longshoreman, hereinafter ("the plaintiff") at a trial in the United States District Court for the Eastern District of New York, before Judge Walter J. Bruchhausen and a jury in December, 1973, obtained a jury verdict on written interrogatories for $235,000 on his unseaworthiness claim (challenged on appeal as excessive), but was denied a recovery by the jury on his negligence claim. The jury granted a verdict in favor of the defendant shipowner, F. A. Detjen, "SAAR" (hereinafter "Detjen") on its claim for indemnity against the third party defendant, Pittston Stevedoring Corp. (hereinafter "Pittston"), finding that the stevedore breached its warranty to the shipowner to perform its work in a reasonably safe and workmanlike manner (A 54a, JA 219a).*

Pittston filed a notice of appeal, dated January 9, 1975, wherein it expressly appealed "from each and every part" of the final judgment and "the whole thereof" entered on December 13, 1974. The judgment so appealed from was entered upon the aforesaid jury verdict and upon Pittston's stipulation that Detjen's attorneys' fees and disbursements be fixed at $5,615.63. The judgment provided, with plaintiff's taxable costs, a total recovery by the plaintiff from Detjen in the sum of $235,244.36 and a total recovery of indemnity by Detjen from Pittston of $240,859.99 (A 55a, JA 220a).

*Since Pittston has already filed a brief with page references to its appendix labelled "Appendix to Appellant's Brief" and the plaintiff has served and is about to file a "Joint Appendix". "A" refers to Pittston's aforesaid Appendix and "JA" refers to the "Joint Appendix".

Because Pittston, against whom full indemnity in Detjen's favor was awarded, appealed from the entire final judgment, Detjen, on January 23, 1975, filed a protective cross-appeal to preserve its standing to urge any error in plaintiff's recovery against it, depending upon the arguments made by Pittston (A 4a, JA 4a).

ISSUES PRESENTED

1. Although Pittston's brief fails to state separately the issues presented for review, it contains no challenge whatsoever to that part of the judgment which held it liable to Detjen for full indemnity and, accordingly, no issue is presented with respect to such indemnity. Indeed, Pittston's brief argues that any injury to plaintiff was caused in the first instance by the "operational negligence" of his "co-workers", employees of Pittston, and also argues that plaintiff participated in such "operational negligence" (Point I, pg. 7). It also concedes, in effect, at Point II that there was evidence that Pittston violated the Safety and Health Regulations For Longshoring, all of which would entitle Detjen to indemnity from Pittston as a matter of law.

2. Pittston's brief urges that the plaintiff did not present a prima facie case of unseaworthiness, or in the alternative that a new trial should be granted because of asserted error in the use of the longshoring safety and health regulations as against Detjen, the shipowner, and because the verdict was grossly excessive.

3. Detjen neither accepts nor rejects Pittston's argument that there was insufficient evidence from which the jury could have found that the operational negligence of Pittston's employees created an unseaworthy condition and, therefore, does not take any position with respect to Point I of Pittston's brief but does take the position that Pittston's argument against the use of the longshoring regulations, in its Point II, is misconceived and should be rejected.

4. On the other hand, Detjen completely joins in and supports only the argument of Pittston, in its PointIII, that the award to the plaintiff of $235,000 was grossly excessive and as dispositive of both Pittston's appeal and Detjen's protective cross-appeal.

POINT I

PITTSTON'S BRIEF HAS NARROWED AND CONFINED ITS APPEAL SOLELY TO THE RECOVERY BY THE PLAINTIFF FROM THE SHIPOWNER, DETJEN, THE DEFENDANT AND THIRD PARTY PLAINTIFF, AND HAS FAILED TO CHALLENGE DETJEN'S RECOVERY OF FULL INDEMNITY AGAINST PITTSTON. CONSEQUENTLY, THE JUDGMENT SHOULD BE AFFIRMED INSOFAR AS IT PROVIDES FOR THE RECOVERY BY DETJEN OF FULL INDEMNITY FROM PITTSTON.

Although Pittston appealed from the entire judgment, which provided both for recovery by plaintiff against Detjen and full indemnity recovery by Detjen against Pittston, it has obviously withdrawn its appeal from such indemnity, challenging only the plaintiff's recovery against Detjen and not challenging the jury's finding that it breached its warranty of workmanlike service. Indeed, at page 7 of Pittston's brief it urges:

"The accident occurred solely because of what may be termed the 'operational negligence' of the plaintiff and his co-workers, for which the plaintiff is not entitled to a recovery against the shipowner."

Manifestly, when the unseaworthy condition, (as found by the jury) was created by the negligence of Pittston's employees, Detjen is entitled to indemnity from Pittston as a matter of law. This would be so even when a plaintiff-employee, of a third party defendant is, himself, guilty of negligence. cf. McLaughlin v Trelleborgs Angfartygs A/B, 408 F.2d 1334, (2d Cir., 1969) cert. den. 395 U.S. 946 (1969); Hartnett v Reiss Steamship Company, 421 F.2d 1011, (2d Cir., 1970); cert. den. 400 U.S. 852 (1970)

Moreover, Pittston's argument at Point II that the longshoring regulations should not be utilized against Detjen, but solely as against Pittston, amounts to an implicit admission that the record contains sufficient evidence from which the jury could have found that Pittston did violate the Safety And Health Regulations For Longshoring, an obvious basis for full indemnity.

Of course, the amount of indemnity would be subject to modification if Pittston is successful on its appeal. Thus, if the plaintiff's complaint should be dismissed, the indemnity would be reduced on remand and confined solely to Detjen's counsel fees and expenses. cf. Massa v C. A. Venezuelan Navigacion, 332 F.2d 779, (2d Cir., 1964)

On the other hand, if the Court should find the amount of the verdict excessive and grant a new trial unless plaintiff is willing to remit a portion of his recovery, the amount of the indemnity would also be modified on remand upon such remittitur, or if a new trial should be held, any further counsel fees and disbursements entailed by Detjen would be increased accordingly unless, of course, Pittston undertakes to take over the defense of the action completely.

POINT II

DETJEN REJECTS THE ARGUMENT IN POINT II OF PITTSTON'S BRIEF AND URGES THAT THE LONGSHORING REGULATIONS WERE NOT IMPROPERLY UTILIZED AGAINST DETJEN AND IN ANY EVENT WERE CONFINED BY THE COURT'S CHARGE TO THE QUESTION OF DETJEN'S INDEMNITY AGAINST PITTSTON.

While the plaintiff raised some of the Longshoring Regulations at the end of his case, this was harmless and could not have confused or mislead the jury since they were referred to and read at length by the Court solely in connection with, and confined to, the portion of its charge relating solely to the question of the right of Detjen to indemnity against Pittston. Indeed, no objection or request was made by either Detjen or Pittston to this manner of reference to the regulations in the Court's charge. The reference in the Appendix to Appellant's Brief to the Court's charge at A 49a, 51a, is not a model of clarity for it is improperly headed "Bushlow Summation" and "Colloquy". However, the Court's charge with respect to indemnity is contained in the record at pages 93b-97b and also at JA 191a-195a.

Pittston's appendix omits the identifying language of the portion of the charge relating to indemnity, which preceeds the relevant regulations and states "The stevedore warranted to the shipowner that it would perform its services...", followed by the reading of the regulations, and continuing thereafter with further identifying language, which states "If you find that the defendant, stevedore, breached its warranty of workmanlike service ... you should render a verdict in favor of the shipowner and against the defendant stevedore, on that issue." (JA 191a-195a)

Pittston's reliance (page 13 of its brief) on Bernardini v Rederi A/B Saturnus, 2d Cir., Docket No. 74-1404, Calendar No. 113, decided March 11, 1975 and Albanese v N.V. Nederl. Amerik. Stoomv. Matts, 346 F.2d 481, (2d Cir., 1965), rev'd on other grounds, 382 U.S. 283, (1966), is thus completely misconceived for in those cases the question involved was "... the correctness of the trial court's instructions dealing with the applicability of the Health and Safety Regulations for Longshoremen to the issue of the shipowner's liability.", and, particularly, the Court's instruction in Albanese that the regulations were "binding on the shipowner". Nothing in the record suggests, that the Court was requested by counsel for any party to advise the jury that the regulations were not binding on or relevant to the liability of the shipowner.

Moreover, the regulations would have no pertinence on this appeal, where the jury made a special finding that the shipowner was not negligent and the jury was at no time ever instructed that the regulations applied to the ship.

The Longshoring Regulations establish a standard of conduct to be followed by the party to whom they apply and, as such, relate to negligence.

POINT III

DETJEN JOINS IN AND SUPPORTS THE ARGUMENT OF PITTSTON'S POINT III THAT THE AWARD TO THE PLAINTIFF OF $235,000 WAS GROSSLY EXCESSIVE

Detjen concurs in the analysis of Pittston's Point III showing that the plaintiff's recovery was grossly excessive.

Since the arguments of Pittston therein is persuasive and clear, it would be a mere duplication to echo such arguments in this brief, and a new trial on damages only should be ordered on the ground of such excessiveness, unless the plaintiff remits at least $100,000 of his recovery.

CONCLUSION

The judgment of the District Court should be affirmed insofar as it awards full indemnity in favor of Detjen, the shipowner against Pittston, the stevedore, subject however to such change in the amount of the indemnity that reflects the disposition by this Court of the appeal with respect to plaintiff's recovery.

With respect to the appeals against the plaintiff, the judgment in favor of the plaintiff should be reversed on the ground that the verdict of $235,000 is grossly excessive and a new trial ordered on the question of damages only, unless the plaintiff remits a portion of his recovery in an amount to be fixed by this Court.

Dated: New York, New York
May , 1975

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Defendant &
Third Party Plaintiff-
Appellee-Cross-Appellant
F. A. Detjen, "SAAR"
120 Broadway
New York, New York 10005

Henry J. O'Brien
Charles N. Fiddler
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

WILLIAM GARAFOLA,

Plaintiff-Appellee,

-against-

F. A. DETJEN, "SAAR",

Defendant & Third Party
Plaintiff-Appellee-
Cross-Appellant,

-against-

PITTSTON STEVEDORING CORP.,

Third Party
Defendant-Appellant.

----------X

Docket No.'s 75-7053
75-7084

CERTIFICATE
OF
SERVICE

WE HEREBY CERTIFY that a copy of the within brief was this date mailed to the following:

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party Defendant-
Appellant Pittston Stevedoring Corp.
801 Second Avenue
New York, New York 10017

IRVING BUSHLOW, ESQ.
Attorney for Plaintiff-Appellee
26 Court Street
Brooklyn, New York 11242

Dated: New York, New York
May 7th, 1975

KIRLIN, CAMPBELL & KEATING

By Henry J. O'Brien

Henry J. O'Brien

Attorneys for Defendant &
Third Party Plaintiff-
Appellee-Cross-Appellant
F. A. Detjen, "SAAR"
120 Broadway
New York, New York 10005